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Nos. 735, 763, 772, 807, 812, 817, 750 Misc.,
792 Misc., 793 Misc., 840 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1959

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NATALIE EVOLA AND VINCENT GIGANTE, PETITIONERS
v.
UNITED STATES OF AMERICA

SALVATORE SANTORA, PETITIONER
v.
UNITED STATES OF AMERICA

DANIEL LERNA AND NICHOLAS LERNA, PETITIONERS
v.
UNITED STATES OF AMERICA

JEAN CAPECE, PETITIONER
v.
UNITED STATES OF AMERICA

JOSEPH DI PALERMO, PETITIONER
v.
UNITED STATES OF AMERICA

VITO GENOVESE, PETITIONER
v.
UNITED STATES OF AMERICA

CHARLES DI PALERMO, PETITIONER
v.
UNITED STATES OF AMERICA

RALPH POLIZZANO, PETITIONER
v.
UNITED STATES OF AMERICA

CARMINE A. POLIZZANO, PETITIONER
v.
UNITED STATES OF AMERICA

CHARLES BARCELLONA, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 274 F. 2d 179.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1960. Petitions for rehearing by a number of petitioners were denied on January 26, 27 and 29, 1960. As to some, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to March 11, 1960, and as to others, until March 26, 1960. All petitions were filed within 30 days after denial of rehearing or within

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[1] The record consists of ten volumes. Volume I constitutes the pretrial proceedings in the district court and will be referred to as "Vol. I". The other nine volumes, which are consecutively paginated, constitute the transcript of proceedings in the district court and will be referred to as "Tr.". In addition, we have lodged with the Clerk of this Court petitioner Genovese's appendix in the court of appeals, which will be referred to as "App."; the grand jury minutes of the chief government witness, which will be referred to as "G.J."; and the four appendices of the appellants in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, which will be referred to as "Stromberg App.".

the time as extended. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the convictions.

2. Whether the court erred in various rulings on evidence.

3. Whether the reduction of the state prison sentence of the chief government witness by the Governor of New York, following the conviction of the petitioners, proves that the witness lied in testifying that no promises were made to him and that the closing argument of the government that no promises were made to the witness was improper.

4. Whether adverse newspaper publicity deprived petitioners (Genovese, No. 817, and the Polizzanos, No. 792 Misc. and No. 793 Misc.) of a fair trial.

5. Whether Petitioner Barcellona (No. 840 Misc.) was deprived of the assistance of counsel.

6. Whether alleged newly discovered evidence entitles petitioner Genovese (No. 817) to relief in this Court.

STATEMENT

A one-count indictment returned in the district court for the Southern District of New York charged the petitioners, together with 25 other defendants and 14 persons named as co-conspirators but not as defendants, with having conspired, from about February 1, 1955, to July 7, 1958, to import, conceal, possess, transport, dilute, purchase, sell and distribute narcotic drugs, in violation of 21 U.S.C.

173 and 174. Twenty-eight overt acts were alleged (App. 53–58a). Petitioners and five others stood trial on January 5, 1959. Following a trial by jury, petitioners and three others were convicted and sentenced to serve varying terms of imprisonment ranging from 5 to 20 years.[2] On appeal, the court of appeals affirmed the judgments as to the petitioners and two others.

The pertinent facts may be summarized as follows:

1. *The evidence.*

a. In early March 1955, in New York City, Nelson Cantellops, the chief government witness,[3] in

[2] Charles Barcellona and Jean Capece received 5-year sentences, the sentence of Barcellona to run consecutively to a New York sentence of from four to five years; Vincent Gigante and Ralph Polizzano received 7 years, the sentence of Ralph Polizzano to run consecutively to a New York sentence of from two years and six months to four years; Carmine Polizzano received 8 years; Alfredo Aviles, Benjamin Rodriquez and Natale Evola received 10 years; Charles Di Palermo, Rocco Mazzie and Nicholas Lessa received 12 years, the sentence of Nicholas Lessa to run concurrently with a prior federal sentence of four years; Daniel Lessa received 14 years, the sentence to run concurrently with a prior federal sentence of five years; Joseph Di Palermo and Vito Genovese received 15 years; and Salvatore Santora received 20 years as a multiple offender under the Narcotics Control Act of 1956. In addition, fines of $20,000 each were levied on Joseph Di Palermo, Natale Evola and Vito Genovese (Tr. 7431–7459).

[3] Four accomplices, Nelson Cantellops, Peter Contes ("Pete the Greek"), Joseph Basile and Salvatore Marino ("Junior"), testified for the government. In testifying, several of the accomplices referred to some of the petitioners with aliases, as follows: Vito Genovese ("The Right Man"); Joseph Di Palermo ("Joe Beck"); Charles Di Palermo ("Charley Brody"); Vincent Gigante ("Chin"); Natale Evola ("Joe Diamond"); Salvatore Santora ("Tom Mix").

seeking financial backing for an electronics device for cheating at a Spanish card game, was referred by a friend to Charles Barcellona (Tr. 979–980). Barcellona loaned $500 to Cantellops (Tr. 983–984). When Cantellops was unable to repay the loan, Barcellona told him that he could do so by delivering "junk" (*i.e.*, narcotics) to the West Coast (Tr. 987). Cantellops agreed to make the trip and was given instructions by Barcellona and Joseph Di Palermo in the presence of the Polizzano brothers (Tr. 989–990). Joseph Di Palermo told Cantellops that the trip would put him in the "big money" and that he "would have a good future in the junk busi[redacted] due to the development of the Spanish market [redacted] New York (Tr. 993–994).

Cantellops carried a package wrapped as a gift to Las Vegas, and at the direction of Carmine Polizzano, who met him there, delivered it to Fiano (Tr. 1025–1028). In New York, Carmine Polizzano told Cantellops that "Joe Beck [Joseph Di Palermo] was very pleased with the trip" and that he should see Barcellona "for the payoff" (Tr. 1031). On the following day, Barcellona paid Cantellops for the trip and indicated that he could supply Cantellops with "junk" if he "wanted to push it" (Tr. 1032). During April and May 1955, Cantellops engaged in the narcotics traffic, ordering narcotics from Barcellona (Tr. 1034–1037).

In June 1955, Carmine Polizzano and Joseph Di Palermo persuaded Cantellops to make a trip to Florida to pick up "stuff" (Tr. 1037–1047). He was paid $600 by Di Palermo, and a "tip" of an ounce of heroin, which was promised him by Carmine Poliz-

zano, was subsequently delivered to him by Russo (Tr. 1051–1055). Cantellops also made trips for Joseph Di Palermo and Carmine Polizzano to Chicago (Tr. 1056–1078) and Miami (Tr. 1100–1127), and made deliveries in New York for Ralph Polizzano (Tr. 1084–1086, 1116–1118). On his second trip to Florida he met Charles Di Palermo who introduced him to a man named "Cuba" (Tr. 1104–1106).

Early in 1956, Cantellops was assigned by Joseph Di Palermo to watch one Gonzalez ("Guayamita") who dealt with a runner named Colletti (Tr. 1159–1161).[4] After Gonzalez was arrested, Cantellops took over his territory, getting his supplies from Ralph Polizzano (Tr. 1172–1176).

b. From early 1956 until November 10, 1956, when he was arrested, Joseph Basile, who testified for the government, purchased large quantities of heroin and cocaine from Joseph Di Palermo for resale purposes, chiefly in Schenectady, New York (Tr. 3913–3916, 3921–3922, 3925–3926, 3929, 3935–3943, 3955, 3958). Basile came to New York City and followed the procedure outlined by Joseph Di Palermo of first calling Jean Capece at a "Walker 5" number, where he either spoke to Joseph Di Palermo or had Capece relay a message for an appointment (Tr. 3938, 3944–3945, 3952, 3955–3957). (Capece had the unpub-

[4] On August 15, 1956, Colletti agreed to sell a "quarter kilo" of heroin to a narcotics agent for $3,000, with delivery to be made at a nearby movie theatre (Tr. 584–589). On leaving the agent, Colletti went directly to a bar and spoke with Ralph Polizzano and Russo (Tr. 504–507, 644). Subsequently, Colletti and Russo were arrested at the delivery site (Tr. 546–547, 589–590). When Ralph Polizzano, who was watching, saw that Colletti and Russo were in custody, he "turned around and hurried" away (Tr. 507).

lished telephone number, Walker 5-8217 (Tr. 4589, 5121, 5123-5125)). Either Joseph Di Palermo or his runners delivered the narcotics to Basile (Tr. 3935-3936, 3941-3942, 3958). Throughout 1956, Capece participated in conversations with Joseph Di Palermo and Basile regarding narcotics (Tr. 3939-3942, 3947-3949, 3956-3957). On one occasion, Capece handed narcotics to Basile at Joseph Di Palermo's direction, and on another occasion, Charles Di Palermo delivered narcotics to Basile (Tr. 3948-3949, 3952-3954). Basile paid Joseph Di Palermo either personally or by wire for the narcotics.[5] On one occasion, acting on instructions from Joseph Di Palermo, he wired $1,000 to Capece (Tr. 3922, 3924, 3957-3961).

c. In the fall of 1955, Carmine Polizzano instructed Cantellops to inquire into "policy banks" in the lower east side in Manhattan, because some "big people" needed this information in order to "seal certain territory" (Tr. 1127-1129, 1145-1146).[6] Later, he instructed Cantellops to investigate the Puerto Rican "facilities" for importing "junk" into the United States. In November 1955, Cantellops went to Ralph Polizzano's apartment and participated in a meeting

[5] Basile testified that he had seen Joseph Di Palermo and John Ormento together, and that on one occasion in early 1956 when he (Basile) gave Di Palermo a "good report on the goods" and ordered another "half-kilo" of heroin, Joseph Di Palermo said, "Yes, this [*sic*] goods will be the same. It is Big John's [Ormento's] goods and it is very good" (Tr. 3926-3929). He also testified that "goods" referred to "drugs, heroin or cocaine" (Tr. 3913).

[6] Cantellops testified that territory is "sealed" when policy numbers are operated as a front for the narcotics traffic (Tr. 1128-1129, 1146-1147, 1383).

attended by Ralph Polizzano, Joseph Di Palermo, Russo, John Ormento ("Big John") and Benjamin Levine ("Mr. Benny") (Tr.1133–1138).[7] Ralph Polizzano said that he wanted to open up additional narcotics plants due to the growing Spanish market, and that the territory would have to be "sealed" (Tr. 1143). All agreed that they would go along with the plans provided "The Right Man" (Genovese) approved (Tr. 1147–1149). When the conversation shifted to the importation of narcotics, Cantellops pointed out that narcotics could be brought into Puerto Rico through the nearby island of Vieques, and that "from the mainland (Puerto Rico) then through different means it could be brought to the United States" (Tr. 1150–1151). The group said that Cantellops would be contacted if Vieques could be used. Later, Ormento and Joseph Di Palermo stated that "because of the revolution in Cuba it was quite difficult to bring narcotics to the United States through the coast" (Tr. 1152). They said that the ships "Marquess De Comilla" and "Salamanca" carried narcotics but were searched, that "a quarter million cargo" had to be dumped in the Havana Harbor, and that an airplane had been purchased but that it was "unreliable for steady supplies" (Tr. 1152–1153). Later, when Cantellops asked for instructions in case of a "fall", Ormento said that he should "put up any story until

[7] Although Carmine Polizzano told Cantellops to attend the meeting, Carmine Polizzano did not attend himself. He was in the apartment with Cantellops, Russo and Ralph Polizzano, but left before Levine, Ormento and Joseph Di Palermo arrived (Tr. 1134).

we reach you with legal aid or money". Levine stated "that the boys always keep their word", and that they could be trusted (Tr. 1155–1156).

d. In July 1956, at the suggestion of Carmine Polizzano, Cantellops agreed to deliver narcotics in Cleveland for Ormento (Tr. 1183–1185). Carmine Polizzano told Cantellops that it was a small, but important, delivery, and that it would help Cantellops in the organization (Tr. 1184). On the following day, as Carmine Polizzano was instructing Cantellops, Vincent Gigante ("Chin") drove up, and was introduced as the man who would drive (Tr. 1188). While enroute to Cleveland, Gigante inquired whether Cantellops knew "Big John" (Ormento), "Joe Beck" (Joseph Di Palermo), "The Right Man" (Genovese); "Tom Meeks [Mix]" (Santora) and others (Tr. 1210). Cantellops told Gigante that he "saw no reason [for] taking chances in dope" when his gambling device, which he explained in detail, "could provide a big amount of income" (Tr. 1210). Later, Gigante said he would contact "Big John" to arrange for Cantellops to meet "The Right Man" for the purpose of looking into the gambling device (Tr. 1210–1211). At Lorain, Ohio, on instructions from Gigante, Cantellops opened the trunk and removed a package of "stuff" from behind the spare tire of the car (Tr. 1211). Cantellops then caught a bus to Cleveland where he met Charles Di Palermo, and the two men made the narcotics delivery to a woman there (Tr. 1213–1215). Cantellops then returned to New York where, at a meeting arranged by Carmine Polizzano, Ormento introduced Cantellops to Mazzie, and in

Mazzie's presence, complimented and paid Cantellops for the Cleveland trip (Tr. 1216).

In early August 1956, as arranged by Carmine Polizzano, Cantellops met Ormento and a Mexican ("Mexico") concerning a pickup of narcotics near the Mexican border (Tr. 1217–1219). Owing to his distrust of the Mexicans, Cantellops turned down the proposition (Tr. 1222–1224). On the following night, Ormento, Mazzie, "Mexico" and Natale Evola ("Joe Diamond") met Cantellops and drove to a restaurant on East 86th Street. While Cantellops was at the restaurant counter, Ormento approached a table and spoke to Genovese (Tr. 1226–1227). Shortly thereafter, Ormento returned and said to Cantellops, "Let's go, the right man wants to take a look at you to see if you are allright" (Tr. 1227).[8] Cantellops, Ormento, Mazzie, Evola and "Mexico" left the restaurant and went to "Mexico's" hotel room where they subsequently met Salvatore Santora ("Tom Mix") (Tr. 1228–1229). The proposed Mexican trip was again discussed. The group finally agreed to Cantellops' suggestion that he should pick up the narcotics in Florida (Tr. 1230–1231). A few days later, in Florida, "Mexico" picked up a suitcase and handed it to Cantellops (Tr. 1233–1234), who delivered it in New York, as arranged, to an unidentified man. At a meeting subsequently arranged by Carmine Polizzano,

[8] On two occasions in the late spring or early summer of 1956, Cantellops saw Carmine Polizzano talking to Vito Genovese, who was not known to Cantellops at that time. On one of these occasions, Carmine Polizzano told Cantellops "never to interfere when he was talking to the right man" (Tr. 1298).

Ormento made part payment to Cantellops (Tr. 1237–1238). The balance of the $950 payment was later paid to Cantellops by Ormento.

Shortly thereafter, Cantellops delivered three to four pounds of narcotics for Ormento to an unidentified courier in Philadelphia (Tr. 1240–1244). Later, Ormento asked Cantellops, in the presence of Santora and Mazzie, if he would make a "trip" for Santora (Tr. 1247–1248, 3567, 3570). On the following day, Santora said that the trip was ready and instructed Cantellops (Tr. 1248–1250, 3575–3576, 3583–3584). Following the delivery of the narcotics in Philadelphia, Cantellops returned to New York where he later met Ormento, Mazzie, Santora and Evola, and was paid by Ormento with money from Santora (Tr. 1251–1252, 3570–3572).

Cantellops, acting on instructions from Ormento, delivered narcotics in the Bronx to an unidentified man for Daniel and Nicholas Lessa, as the Lessa brothers watched nearby (Tr. 1276–1282). Toward the end of August, Cantellops, acting on instructions from Ormento, made another narcotics delivery to an unidentified man for the Lessa brothers, who, along with Mazzie, were near the delivery site (Tr. 1282–1286, 1288–1289). Cantellops was later paid by Ormento.

Peter Contes testified to purchasing narcotics from in Lessas in 1956 (Tr. 3755–3775). Ormento and Mazzie encouraged Daniel Lessa to deal with Contes (Tr. 3756–3760).

d. In late August or early September 1956, Cantellops met Ormento, Evola, and two others, and the group drove to a German restaurant (Tr. 1291–1292). Or-

mento went inside to make a telephone call, returned to the car, and said, "We can go; they are behind us" (Tr. 1292–1293). The group then drove to a turnoff on the West Side Highway, where a second car subsequently pulled up. Ormento and Cantellops left their car and entered the second car which was driven by Gigante for Genovese (Tr. 1293–1295, 1301). In introducing Cantellops, Ormento said to Genovese, "This man is doing a good job for us. He is helping us and doing a good job for us" (Tr. 1296). Ormento referred to Genovese as "the right man" (Tr. 1296). Genovese told Cantellops that they "were going to a meeting where territorial control was to be discussed," that people were counting on Cantellops' assistance, and that Cantellops, by helping them out, could earn enough money to cover the cost of a sample gambling device (Tr. 1297) (Cantellops had explained his gambling scheme to Genovese earlier in the evening). At about 11 p.m., the two automobiles arrived at Mazzie's home in the Bronx. All but Gigante and Genovese entered the premises. The group discussed "sealing off" the Longwood area in the East Bronx by the use of policy banks, a plan to facilitate the distribution of narcotics to the Spanish market (Tr. 1303–1306, 1308, 1312–1314). Ormento said that "numbers" was not a problem, that the big problem was "too many pushers" (Tr. 1307).

Toward the close of this conversation, which lasted 20 or 30 minutes, Genovese entered the room and inquired of their decision (Tr. 1315). Genovese said that he needed this information "because he wanted

to know when to send his men in" (Tr. 1315). At this point, everyone engaged in conversations regarding the time and details of the plan. At the close of the meeting, Genovese and Gigante drove off in one car, and the rest of the men drove off in another car. Ormento instructed Cantellops to check the operations of the pushers and make a determination as to what could be done to get rid of them (Tr. 1317). In the presence of Evola, Ormento told Cantellops that he (Cantellops) would be the distributor and "contact man" for the new territory (Tr. 1316–1317).

e. In early September 1956, Cantellops, acting on instructions from Ormento and Galante, flew to Puerto Rico and contacted one "Laurensano" in an effort to pick up narcotics (Tr. 1321–1323, 1325–1326). Cantellops went to the island of Vieques, off Puerto Rico, and picked up eight to nine pounds of heroin. He returned to Puerto Rico and, after notifying "Laurensano," mailed the narcotics in three packages to fictitious persons in care of general delivery in New York (Tr. 1331–1334). On his return to New York, Cantellops was paid by Ormento, although Ormento was "quite upset" over Cantellops' use of the mails (Tr. 1335–1336)

Shortly thereafter, as arranged by Carmine Polizzano, Cantellops met Joseph Di Palermo, "Cuba" and "Montanez" in a Spanish nightclub. Montanez told Joseph Di Palermo not to expect any more deliveries through Key West and Miami for the rest of the year (due to the Cuban revolution), and that "they could not supply steady" with planes (Tr. 1339–1340). A

few days later, Cantellops was arrested and imprisoned until February 1957 (Tr. 1337, 1340–1341).

In mid-November 1956, Joseph Di Palermo, Capece and a third party traveled to Havana, Cuba. The trio returned to New York on November 20, where, in passing through the United States Customs at Idlewild Airport, a customs inspectress found $9,000 in new, consecutively-numbered $100 bills in an undergarment of Capece (Tr. 4579–4581, 4591). At first, Capece said that the money represented her life's savings, then that it was won at gambling, and later that it was a loan from a person whose name she would not divulge (Tr. 4579–4582, 4591–4592).

f. Shortly after his release from prison in February 1957, Cantellops contacted Ralph Polizzano who, unaware of the fact that Cantellops had been imprisoned, said that Cantellops could get narcotics from him (Tr. 1341–1342). Cantellops obtained Alfredo Aviles as a narcotics customer and made one to two narcotics deliveries a week to Aviles for Ralph Polizzano (Tr. 1355–1356). On one occasion, when Joseph Di Palermo was present, Cantellops saw Ralph Polizzano hand Capece the proceeds from a narcotics transaction with Aviles (Tr. 1361–1364). About the beginning of April 1957, Cantellops introduced Aviles to Ralph Polizzano, and Aviles began to purchase narcotics directly from Ralph Polizzano. (Tr. 1357–1359). In May, Ralph Polizzano delivered narcotics to Aviles at a nearby bar. Later he had Marino make delivery (Tr. 289–296).

g. In late April 1957, on instructions from Joseph Di Palermo and Carmine Polizzano, Cantellops trav-

eled to Miami, Florida, where he met Charles Di Palermo and "Cuba," and the trio picked up narcotics in Key West (Tr. 1364–1366, 1369–1370). A little later, Charles Di Palermo gave Cantellops additional narcotics for return to New York (Tr. 1372–1375). On his return to New York, Cantellops delivered the narcotics to Carmine Polizzano, and later, Joseph Di Palermo paid Cantellops in the presence of Carmine Polizzano (Tr. 1376–1377). Shortly thereafter, Ralph Polizzano had Marino give Cantellops a "tip" of an ounce of heroin, which Carmine Polizzano had promised Cantellops earlier (Tr. 1377–1378).

h. In early June 1957, Joseph Di Palermo, at a meeting with Cantellops and the Polizzano brothers, said that "things were not healthy" and that "he would have to take a vacation" (Tr. 1385–1386). He told Cantellops that Charles Di Palermo would take over, and that Cantellops could continue to "do business" with the Polizzano brothers (Tr. 1386). Throughout June, Cantellops made narcotics deliveries for Carmine Polizzano and was paid by Ralph Polizzano (Tr. 1386–1388).

Cantellops was arrested on July 1, 1957, and a few days later, Ralph Polizzano and Marino were arrested following a local delivery of narcotics. Ralph Polizzano, in response to an inquiry as to the location of the "junk," pointed out that "[i]t's in a black zipper case; it's up on top" (Tr. 106). This case contained two containers of "white powder" which, on later analysis, was found to be heroin and cocaine (Tr. 490–492).

2. *The examination of Cantellops*

a. Cantellops was under cross-examination from January 30, 1959, to February 25, 1959. On February 10, Cantellops identified a letter which he had written to his daughter in which he apparently wrote that he expected to be released around Christmas 1958 (Tr. 2512–2515). Following the court's refusal to hear a "constitutional request" from Cantellops (concerning the manner counsel obtained the letter) (Tr. 2514–2516), the cross-examination continued, during which Cantellops denied that he had been promised he would be released from prison by Christmas of 1958 (Tr. 2515.)

After the noon recess, the government moved to remand Daniel Lessa for threatening a federal agent (Tr. 2518–2519), and to suppress the letter as possibly obtained in violation of law (Tr. 2524). Without objection, the jury was excused for the afternoon (Tr. 2544–2546).

At the conclusion of the argument on the motions, the United States Attorney informed the court that Cantellops had told the United States Marshal that he was concerned with the safety of his daughter and "would not testify further unless he saw his daughter" (Tr. 2559). The United States Attorney suggested that "in view of the recess this afternoon * * * it might be appropriate if the witness were permitted to see his daughter" (Tr. 2559). Over the objections of counsel for Evola and Gigante, the court permitted Cantellops to visit with his daughter (Tr. 2559–2571).

At the opening of court on the following day, February 11, 1959, the court stated that it had been informed that Cantellops wished to speak to the court. The court reported that it had refused to speak with the witness except in the presence of all counsel and that "in view of his claim of privilege yesterday or assertion of constitutional rights" it would assign counsel to the witness (Tr. 2574–2575). On short notice, the court obtained the services of Arnold Fraiman, Esq., with whom the witness could discuss his claim of constitutional right or privilege in order "to protect his individual rights, maybe against the Government" (Tr. 2582–2583). Cantellops accepted the appointment of counsel but did not avail himself of his services at the time (Tr. 2584). Cross-examination thereupon continued for the remainder of the day (Tr. 2593–2676). That afternoon, during a recess, Cantellops spoke with Mr. Fraiman as to whether he should answer certain questions regarding his health as expressed in another letter which Cantellops had written his daughter. Mr. Fraiman advised Cantellops "to answer the questions that were put to him with respect to the letter" (Tr. 2679), and Cantellops answered all the questions put to him concerning the letter (Tr. 2663–2675). Subsequently, counsel for Evola and Gigante concluded his cross-examination, and the jury was excused for the weekend (Tr. 2676–2678). On Monday, February 16, 1959, the court granted permission to counsel for Evola and Gigante to re-open his cross-examination, and counsel inquired into other matters (Tr. 2703–2716).

b. Toward the close of the government's direct examination of Cantellops, the court ordered the United States Attorney to make Cantellops' grand jury testimony available to defense counsel (Tr. 1392). The United States Attorney complied with the direction, and also gave defense counsel a statement from Cantellops, dated October 10, 1957 (Tr. 1392, 1400–1401, 1479, 1592). In addition, the United States Attorney turned over the complete files of the New York Branch of the Bureau of Narcotics to the court for an *in camera* inspection of the reports (Tr. 1592–1593, 1615, 2018). The court spent thirty hours examining these files (Tr. 2052), and on February 4, 1959, conducted a *voir dire* examination of Agents Enright, Matuozzi, Consoli and Muglia concerning reports made by them of their activities regarding the case. The court turned over reports which the agents said were substantially verbatim accounts of statements from Cantellops (Tr. 2013–2018, 2019–2025; 2033–2037; 2042–2044).

On February 18, 1959, at the suggestion of the government, the court conducted a *voir dire* examination of Agent Rowan into four of his reports. Rowan testified that his "notes" were not in existence, and the court refused to inquire, as suggested by counsel for Evola and Gigante, whether the notes were "destroyed" (Tr. 3170). The court ordered portions of four of Rowan's reports, which according to Rowan's testimony were substantially verbatim statements from Cantellops, turned over to defense counsel (Tr. 3172–3173).

On February 19, 1959, an Assistant United States Attorney informed the court that a statement from Cantellops, dated January 16, 1958, had been found, and that he was prepared "to turn this over to defense counsel" (Tr. 3267). He stated that (Tr. 3268) "in the preparation of this case from its inception back in mid-1957, many different Assistant United States Attorneys have been involved, and during the course of the trial when counsel have asked whether certain documents were in existence I continually conferred with them, and this one turned up. When it turned up we turned it over. We can do no more than that."

c. The grand jury minutes turned over to the defense were of Cantellops' appearances in July 1957, March 1958 and June 1958.[9]

In his June 1958 appearances before the grand jury, Cantellops altered his March 1958 grand jury testimony in three material particulars:[10] (1) He testified that, following his first Miami trip, he met

[9] On July 30, 1957, Cantellops testified before the grand jury that he purchased his narcotics from Colletti (G.J. 3–5); that Colletti's supplier was Ralph Polizzano (G.J. 3); that he met Ralph Polizzano one week before Colletti was arrested (G.J. 5). At the trial, Cantellops testified that he was not cooperating with the grand jury in July 1957 (Tr. 2724).

[10] Cantellops also testified that Barcellona paid him $400, instead of $350, for the Las Vegas trip (G.J. 281–282; compare G.J. 54); that he mixed narcotics at "[d]ifferent places" on 1st Street and 109th Street, not in Curvello's apartment (G.J. 282); that, following the first Philadelphia delivery, Ormento paid him in a park, not in "Mexico's" apartment (G.J. 288–289); and that, following his Philadelphia deliveries, he returned to New York by bus, not by train (G.J. 294; compare G.J. 200).

Charles Di Palmero, not Carmine Polizzano, on the "other end" of his later trips to Miami, but that Carmine Polizzano had participated in the planning of the trips (G.J. 283–284; compare G.J. 94–99, 194, 228). (2) He testified that he traveled by automobile with Gigante to Lorain, Ohio, and then by bus to Cleveland, not by bus from New York to Cleveland (G.J. 290–293; compare G.J. 193–194). (3) He testified that he had seen Carmine Polizzano talking to Genovese, that Ormento introduced him to Genovese, and that Genovese participated at the end of a meeting where territorial control and the distribution of narcotics were discussed (G.J. 303–304, 306–309, 312). On March 18, 1958, Cantellops had testified before the grand jury that he saw Genovese only once, but that he "never had a chance to talk to him" (G.J. 146). Cantellops explained his "misstatements" as to Gigante and Genovese to the grand jury as follows (G.J. 290–291):

> A. I think—you may find some misstatements here is perhaps a period of long time, but in this particular instance [the Lorain, Ohio, trip with Gigante] it has not been a period of long time. It is a struggle I have been having, mentally, within myself. This period of this trip is what really has been having me thinking continuously if I do—I do not know my full help struggling with myself about doubts in my mind about the outcome of my future, and the natural law of self-preservation. Naturally, I hope that the same society that I am helping, I am protecting now, will be the same society that in the future will forgive my past errors and

will help me to straighten out, and perhaps be grateful for what I am doing.

The main thing in this point now, is now I am right now here, we are going to take one of the most dangerous sections of this syndicate. That's why I took so long for me to clear my mind and decide what I have to do.

So at that particular time I was ready to make a clear distinction where I think I should go ahead and help to the full extent, even knowing the risk that is involved.

So I thank you for that, gentlemen.

Q. Tell us now, about this trip to Cleveland.

THE FOREMAN. May I make a comment. I'd like to speak for the jury—that we appreciate what you are doing. We realize the dangers involved. You understand the testimony you give to us is secret and confidential. You must rely on us as citizens with a sense of social responsibility to keep your testimony secret and confidential, so that you should not have any fear of danger that will come from your disclosures to us.

THE WITNESS. I realize that, and that is why I am willing to go ahead and take the consequence. Because faith is one of the main things in human nature."

3. *The request for depositions*

The trial commenced on January 5, 1959, and terminated on April 3, 1959. On December 8, 1958,

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[11] In March 1958, Cantellops had told the grand jury that the people who informed or "talked" against the syndicate "just disappear[ed]" (G.J. 144–148). He said that he had been threatened on occasions, and that physical mutilation of a victim who "talked" is "common conversation among those people" (G.J. 148–149, 170–171).

counsel for Genovese informed the court that on December 6, 1958, Genovese had received a telephone call from Customs Agent Begendorf, whom Genovese had met two years earlier (Vol. I, 271–272). Counsel stated that Begendorf requested permission to see Genovese, and that an appointment was made with Genovese at the latter's home. According to counsel, Begendorf advised Genovese that the indictment had been obtained against Genovese for publicity purposes (Vol. I, 272–273). Counsel requested the court to "find out the reason why he (Begendorf) called my client" (Vol. I, 274). The court reserved a decision on this application until the United States Attorney investigated the incident (Vol. I, 276).

Later that afternoon, the United States Attorney reported to the court that Begendorf had been interrogated and that a statement in question and answer form had been taken from him. In this statement, Begendorf admitted telephoning and visiting Genovese, but denied saying that the indictment had been obtained for publicity or that the case was a "frame-up" (Vol. I, 287–288). Begendorf said that the visit with Genovese was his own idea, that it was unauthorized, that no one connected with the government had any knowledge of this visit, and that he made no report of his actions (Vol. I, 288–293). Counsel for the petitioner agreed that Begendorf's statement should be transcribed and made available to the court for inspection *in camera*, and that it would not be given to defense counsel unless it contained matter not accurately reflected by the United States Attorney's description thereof (Vol. I, 302). On the fol-

lowing day, a copy of this statement was given to the court for inspection *in camera*.

On December 12, 1958, Genovese moved, upon his affidavit, to take the deposition of Begendorf. The government submitted affidavits in opposition which indicated that Begendorf's visit with Genovese was not directed or suggested by the United States Attorney's Office, the United States Customs House, or the New York Office of the Bureau of Narcotics (Vol. I, 443–445; App. 1181–1186). Begendorf's affidavit stated that no one in any governmental agency instructed him to visit Genovese. Begendorf's affidavit also stated that he had not told Genovese he had been framed (App. 1188a). On December 30, 1958, the motion for depositions was denied (App. 132a).

On January 23, 1959, counsel for Evola and Gigante informed the court that he had received in the mail from an anonymous source two copies of memoranda of the Bureau of Narcotics, dated April 14, 1958, and May 5, 1958. At the close of the court day, this incident was discussed in chambers. The United States Attorney admitted that the memoranda, bearing the name of Narcotics Agent Enright, were "copies in part of agents' reports of the Bureau of Narcotics" (Tr. 1113L). The memoranda indicated that Begendorf was assigned to the narcotics squad of the United States Attorney's Office, and that an Assistant United States Attorney had indicated the existence of inaccuracies in Cantellops' grand jury testimony (Tr. 1113N, 1113Q). This information was subsequently passed on to counsel for Genovese.

On January 28, 1959, counsel for Genovese orally renewed his motion to take Begendorf's deposition on the ground that "an examination under oath will disclose whether or not he [Begendorf] did not go pursuant to direction by Mr. Enright or any one of his superiors to entrap or to get admissions from Mr. Genovese in order to present that at the trial here" (Tr. 1425). Thereafter, counsel for Genovese moved in writing to take the depositions of Begendorf and Enright (App. 1162a–1173a). The government submitted affidavits in opposition to this motion. The affidavit of Agent Enright stated, in part (App. 1179–1180a):

> * * * At the time I thought Agent Begendorf had been assigned to the Special Squad [of the Bureau of Narcotics] [*sic*] he had been present in our office at the United States Court House, Foley Square, upon various occasions together with Customs Agent James Flynn, who I am advised, was assigned to the Special Squad. I mistakenly assumed that Agent Begendorf was similarly assigned because he was together with Agent Flynn upon various occasions.
>
> I subsequently learned that Agent Begendorf was not assigned to the Special Squad. I was advised that he had been reporting to Agent Flynn during the early stages of his new assignment as a customs agent. At no time did I assign Agent Begendorf to any investigation of Vito Genovese.

On February 26, 1959, after argument by counsel, the court denied the motion for depositions, pointing

out that the incident had no relevance to the issues at the trial (Tr. 4003; see Tr. 1424–1430).

ARGUMENT

I

In varying forms all the petitioners contend that the evidence does not support their convictions. The matter was thoroughly considered by the court below and presents no issue requiring consideration by this Court.

a. The attack on the credibility of Cantellops [12] is an attempt to reargue an issue which was for the jury to determine. His manner of testifying and demeanor on the witness stand, his prior perjury and inconsistent statements before the grand jury,[13] the question

[12] Pet. No. 792 Misc., 15–19; Pet. No. 793 Misc., 9–12; Pet. No. 750 Misc., 4–9, 17–18; Pet. No. 817, 34–39.

[13] There is no doubt that Cantellops committed perjury when he appeared before the grand jury in July 1957 when, for example, he stated that he first met Ralph Polizzano "about a week before Solly (Colletti) was arrested" (G.J. 5). However, Cantellops testified at the trial that he was "not cooperative" at that time, a conclusion which is apparent on a reading of his July grand jury testimony (Tr. 1858; G.J. 1–36). Indeed, Cantellops had been instructed to "put up any story" until he could be reached "with legal aid or money" (Tr. 1155–1156, 2904–2905).

Subsequently, Cantellops had a change of heart, and in March 1958, in a series of appearances before the grand jury, he implicated all the petitioners except Gigante and Genovese. Prior to implicating these two petitioners, Cantellops told the grand jury that he was about to disclose "one of the most dangerous sections of this syndicate," that this had worried him for quite some time, that there was personal danger in exposing these men, but that, regardless of the personal risk, he would "go ahead and help to the full extent". It was for the jury to weigh that explanation.

Cantellops had also informed the grand jury in June that he had been mistaken in his March grand jury testimony, that

whether or not his testimony was worthy of belief, standing alone or corroborated, were matters affecting the weight, not the admissibility, of Cantellops' testimony. Counsel for the petitioners conducted an exhaustive and searching cross-examination of Cantellops before the jury, in which they hammered again and again at instances of grand jury perjury and inconsistent statements (Tr. 1838–1839, 1855, 1858, 1868–1872, 1873, 1956, 1963, 2253–2254, 2388, 2411–2413, 2463–2464, 2610–2611, 2659, 2810–2811, 2814, 2830–2831, 2869, 2871, 3031–3033, 3122–3123, 3125–3127, 3387, 3443). That the jury scrutinized Cantellops' testimony is apparent from the fact that the jury called for the transcript of the cross-examination of Cantellops conducted by Genovese's counsel, and that portion of Cantellops' testimony when he identified the defendant Fiano whom they acquitted.

The jury were instructed that an accomplice's testimony "should be viewed with great caution and scrutinized carefully" (Tr. 7174–7176). Petitioners were entitled to no more. *Holmgren* v. *United States*, 217 U.S. 509, 523–524; *Caminetti* v. *United States*, 242 U.S. 470, 495.[14] There is no occasion to consider peti-

Charles Di Palermo, not Carmine Polizzano, had met him at the "other end" of his later Miami trips (G.J. 282–283). Cantellops told the grand jury that the misstatements were due to a "period of long time," and unhesitatingly clarified the matter before the grand jury. Cantellops' March grand jury testimony, as modified by that given to the grand jury in June 1958, was substantially the same version of events as that testified to at the trial.

[14] The Lessas (Pet. No. 772, 17–22) and Genovese (Pet. No. 817, 45–47) contend that the trial court erred when, on summarizing the evidence, it failed to point out "variations" be-

tioner Genovese's claim (Pet. No. 817, 34–39) that this Court should re-examine the rule in the federal courts that corroboration of an accomplice's testimony is not required, for Cantellops, although not corroborated as to Genovese, was directly or circumstantially corroborated on so many material particulars that the claim must fall for want of a predicate. Corroborative testimony was introduced which indicated that Cantellops had put up a deposit and submitted his plans for a gambling device to the Sigma Electric Corporation (Tr. Peikes, 4701–4707); that he was present in Las Vegas and worked for a few days in the "Golden Nuggett" Casino in Las Vegas in late March 1955 (Tr. King, 5051, 5055); that 36 East 4th Street was Ralph Polizzano's narcotics distribution "plant" (Tr. Marino, 208–212, 301–304); that Marino delivered narcotics to Cantellops (Tr. 209–212, 277–282); that Ormento, Mazzie, Ralph Polizzano, Colletti, Contes, the Di Palermos and the Lessas were engaged in the narcotics traffic (see testimony of Marino, Contes and Basile in the Statement, *supra*); that Cantellops and Marino delivered narcotics to Aviles (Tr. Marino, 294–296); that Cantellops introduced Aviles to Ralph Polizzano (Tr. Marino, 289–290); that narcotics were

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tween Cantellops' trial and grand jury testimony. A court, in summarizing the evidence, cannot go into all details. The court's only duty is to fairly and accurately summarize the evidence adduced at the trial, and to inform the jury that the summarization is merely the court's recollection of the evidence, which, if contrary to the jury's independent recollection, need not be considered. *Starr* v. *United States*, 153 U.S. 614, 625; *Wiborg* v. *United States*, 163 U.S. 632, 656; *United States* v. *Murdock*, 290 U.S. 389, 394; *Quercia* v. *United States*, 289 U.S. 466, 470.

often hidden behind the toilet bowl in Al's Luncheonette (Tr. Marino, 230–231, 282); that Colletti and Russo were engaged in the narcotics traffic (Tr. Zurlo, 504–508; Dolce, 545–548; Palma, 582–589; Schrier, 629–647); that Ralph Polizzano knew Colletti and Russo (Tr. Zurlo, 504–508; Schrier, 643–644); that Marino worked at the Squeez-Inn Bar and delivered narcotics for Ralph Polizzano (Tr. Marino, 209–214, 228–231, 275–295); that Cantellops delivered narcotics to Contes in early August 1956 (Tr. Contes, 3773–3775); that Cantellops' description of the lobby of the Del Rio Hotel was correct (Tr. Okun, 5874–5875); that there was a "Montanes" and an "Alfonso" on Por Venir Street in Havana, Cuba, and that they engaged in the narcotics traffic there (Tr. Lopez, 5304–5308, 5317); that the "Marques de Comillas" and the "Talmanca" were ships operating out of Havana (Tr. Lopez, 5310–5312); that Joseph Di Palermo, Charles Di Palermo, Ormento, Santora and Contes were known to others as "Joe Beck," "Charley Brody," "Big John," "Tom Mix" and "Pete the Greek" (Tr. Contes, 3731, 3737–3738; Basile, 3900–3901, 3926–3929, 3949–3950).

b. Petitioners Ralph and Carmine Polizzano (Pet. No. 792 Misc., 19–21; Pet. No. 793 Misc., 16–19) lift numerous narcotics transactions out of context and argue that this evidence tended to prove "numerous unconnected small conspiracies." The evidence set forth in the Statement, however, shows that these petitioners were large suppliers who participated in policy decisions, directed or participated in Cantellops' trips

to get narcotics, and then sold the narcotics. Their participation in the selling end, such as the Aviles transactions, was in furtherance of the overall plan which was, not only to get, but to sell narcotics. This was a typical narcotics ring consisting of policy level importers and distributors at one end, the street level wholesalers at the other end, and the large wholesalers and their henchmen in the middle. Cf. *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863; *United States* v. *Tramaglino*, 197 F. 2d 928 (C.A. 2), certiorari denied, 344 U.S. 864; *United States* v. *Rich*, 262 F. 2d 415 (C.A. 2). See also *Blumenthal* v. *United States*, 332 U.S. 539, 558. These petitioners were at the upper level.

In view of that fact, the claim of Carmine Polizzano (No. 793 Misc.) that the number of defendants deprived him of a fair trial is without merit. By associating himself with a large conspiracy, petitioner risked trial with his numerous associates. *Kotteakos* v. *United States*, 328 U.S. 750, 773; *Allen* v. *United States*, 4 F. 2d 688 (C.A. 7), certiorari denied *sub nom. Hunter* v. *United States*, 267 U.S. 597.

Contrary to petitioner Joseph Di Palermo's contention that he was not part of one overall conspiracy (Pet. No. 812, 10, 11–15), the record indicates that the petitioner was continuously in the conspiracy. The fact that he purchased narcotics from an outside source until November 1955, as proved by the record in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, does not preclude the conclusion that he contemporaneously belonged to this conspiracy. The proof in *Stromberg* indicated that

this petitioner purchased from Vellucci narcotics imported from France which he resold to his customers, one of whom was Basile (Stromberg App. 608–612, 616–618, 623–625, 932–944, 963–974, 989–990). No mention was made in *Stromberg* of Cantellops and the Polizzanos and Barcellona, the people in the instant conspiracy with whom Di Palermo dealt from March to November 1955. The evidence here showed that Di Palermo assisted in the planning of the Las Vegas narcotics delivery in March 1955, the Chicago narcotics delivery in August 1955, and the two narcotics pickups which Cantellops made in Florida in June and October 1955. See the Statement, *supra*. The narcotics which Cantellops picked up in Florida came from Cuba (Tr. 1037–1038, 1094–1095), a fact which is fortified by petitioner's trip to Havana in November 1956 with one of his narcotics runners and Capece (Tr. 4581, 4591–4594, 4600). Thus the actors, events, and source of narcotics during the instant period were separate and distinct from the actors, events and source of narcotics in the *Stromberg* case.[15]

[15] Petitioner states (Pet. No. 812, 8) that "Cantellops' testimony concerning the petitioner during these nine months (March to November 1955) is in no way different from the testimony given by Basile in *United States* v. *Stromberg*, *supra*." (Stromberg App. 928–947, 952–990). In an attempt to place Cantellops in the same position as Basile as regards the petitioner, petitioner states (Pet. No. 812, 8), that "Cantellops purchased narcotics from the petitioner for re-sale (his tips for trips) as well as delivered the same from time to time for the petitioner." The record, however, indicates that Cantellops, unlike Basile, never purchased narcotics from Joseph Di Palermo and that Cantellops received his "tips" from Russo or Marino according to the promises made him by Carmine Polizzano (Tr. 1054–1055, 1122, 1124–1127, 1377–1378).

Subsequent to November 1955, Di Palermo planned with the Polizzanos for Cantellops' takeover of the narcotics territory of Gonzalez in 1956; he had many meetings with the Polizzanos, Cantellops and others when narcotics were discussed; he planned a pickup in April 1957. He was clearly in the conspiracy until he decided to "take a vacation" in June 1957.[16]

c. The evidence as to the individual defendants was, as the court below found, sufficient. We discuss the points raised by various petitioners briefly.

1. Carmine Polizzano (No. 793 Misc.) either planned or assisted in the wholesale distribution of narcotics throughout the United States, instructed Cantellops in picking up large quantities of narcotics in Florida, and arranged many meetings between Cantellops and high level conspirators. See the Statement, *supra*. To support his contention that the case against him "hung by a thread", this petitioner relies on the fact that Cantellops implicated and identified one "Carmine J. Polizzano" to a narcotics agent, instead of the petitioner, "Carmine A. Polizzano", and that Cantellops identified "Carmine J. Polizzano" before the grand jury in March, and did not identify the petitioner before the grand jury until June 1958. But

[16] In support of his contention that multiple conspiracies were proven, Di Palermo argues (Pet. No. 812, 11-15) that the August 1956 meeting in Mazzie's apartment was designed to eliminate competition from Rodriguez, Ralph Polizzano's customer in the Bronx, and hence to eliminate petitioner who was connected with Ralph Polizzano. But Di Palermo and Ralph Polizzano discussed with Ormento and Cantellops in 1955 and 1957 the feasibility of "sealing" off the lower East Side, so that, whatever the relationship of the two areas, Ormento was clearly not trying to keep Di Palermo and Ralph Polizzano out of the narcotics business.

neither the narcotics agent nor the Assistant United States Attorney who was conducting the grand jury investigation requested Cantellops to connect the picture of Carmine J. Polizzano to the conspiracy; they merely requested Cantellops to identify the picture, which he did (G.J. 241–242; Tr. 2845–2846, 3223–3224). The identification of Carmine J. Polizzano's picture before the grand jury in no wise placed a duty on Cantellops to distinguish the two Polizzanos because he was not only asked to identify this and other pictures in rapid sequence (G.J. 241–247), but was shown other pictures of individuals who were also unconnected with the conspiracy (G.J. 243, 244). And the Assistant United States Attorney could hardly be expected to request that Cantellops describe the connection which Carmine J. Polizzano had with the conspiracy, for Cantellops had testified about a "Carmine Polizzano" and had identified a "Carmine Polizzano." There was, therefore, no mis-identification of the petitioner before the grand jury, nor did Cantellops knowingly mislead the grand jury or the narcotics agent. It was evidently a simple misunderstanding."

2. Santora (Pet. No. 763, 3–11) participated with other top level co-conspirators in a lengthy meeting which brought about the importation of a large quantity of narcotics through Florida; attended two secretive meetings in the darkened park with Mazzie, Ormento and Cantellops (and with Evola at the second such meeting) when the distribution of narcotics was

[1] Petitioner Charles Di Palermo terms this entire incident as "monstrous and shocking" perjury (Pet. No. 750 Misc., 8–9).

planned; was present with Mazzie in a darkened park when Ormento paid Cantellops for the first Philadelphia delivery of narcotics; and arranged the second distribution of narcotics to Philadelphia through Cantellops. See the Statement, *supra*. This conduct indicated petitioner's knowledge of the broader scope of the conspiracy in importing and distributing wholesale quantities of narcotics. It is immaterial (see Pet. No. 763, 8) that evidence of Santora's contact with the conspiracy is apparent only in August 1956, for as long as there is "knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users," he may lawfully be regarded as one of the "accredited members of the conspiracy." *United States* v. *Rich*, 262 F. 2d 415, 418 (C.A. 2); see *Williamson* v. *United States*, 207 U.S. 425, 449; *Lefco* v. *United States*, 74 F. 2d 66, 68 (C.A. 3).[18]

3. Petitioners Daniel and Nicholas Lessa contend (Pet. No. 772, 6-10) that the evidence was insufficient to support their convictions because it indicated that the petitioners, "on two occasions, purchased an undisclosed amount of narcotics from two persons who were shown by evidence not connected with appellants." Apparently, petitioners are referring to the two narcotic deliveries which Cantellops made to

[18] Santora compares the delivery of narcotics which Cantellops made for him with the deliveries Cantellops made for Ormento, and argues that the Santora delivery was an "independent venture" because there was no "security man" at the delivery site. Cantellops, however, delivered narcotics for many members of the conspiracy. No "security man" was present when Cantellops mailed narcotics from Puerto Rico.

them for Ormento and Mazzie in August 1956 (Tr. (1279–1283, 1286–1290). But petitioners omit the salient facts that Ormento and Mazzie prompted Daniel Lessa in January 1956 to supply narcotics to Contes, that Daniel Lessa instructed Nicholas Lessa to make the first of many deliveries to Contes, that Nicholas Lessa supplied Contes with from three to five ounces every ten days until August 1956, that Mazzie was at the delivery site when Cantellops made his second delivery of narcotics to the Lessa brothers, that Cantellops delivered a quarter kilo of heroin to Contes for Mazzie after Contes had placed this unusually large order with Nicholas Lessa, and that Mazzie arranged for, and paid Cantellops, for this large delivery to Contes (Tr. 1269–1273, 1288–1289, 3755–3768, 3771–3775, 3801). This was direct evidence that the petitioners knowingly and actively participated in the conspiracy at the wholesale narcotics-distribution level.

4. Barcellona contends (Pet. No. 840 Misc., 14–16) that the evidence was insufficient to support his conviction because his only contact with the conspiracy was "a single isolated narcotics transaction" involving his participation in the Las Vegas trip. The evidence, however, indicated that Barcellona was acting in concert with Joseph Di Palermo who assisted in planning the Las Vegas delivery (Tr. 993–998, 1031–1033) and Carmine Polizzano who instructed Cantellops to get in touch with Barcellona for the "payoff" (Tr. 1031). In addition, petitioner supplied Cantellops with narcotics in April and May 1955 (Tr. 1034–1037). Much more is present here than in those cases which have affirmed the conspiracy conviction

of a defendant whose "one act" was sufficiently probative of conscious participation in the criminal enterprize charged in the indictment. See, *e.g.*, *Parente* v. *United States*, 249 F. 2d 752, 753 (C.A. 9); *United States* v. *Farina*, 184 F. 2d 18, 19 (C.A. 2), certiorari denied, 340 U.S. 875; *United States* v. *Carminati*, 247 F. 2d 640, 642, 643 (C.A. 2), certiorari denied, 355 U.S. 883.

5. By comparing Cantellops' trial testimony concerning Evola at the second meeting in "Mexico's" hotel room with Cantellops' grand jury testimony concerning a "third meeting" in "Mexico's" hotel room with Galente and others (G.J. 179), and by comparing Cantellops' description of Galente before the grand jury on March 20, 1958, with Cantellops' correct identification of Evola's photograph before the grand jury on March 26, 1958, petitioner Evola contends (Pet. No. 735, 7–12) that Cantellops "substituted" Evola for Galente. Aside from the fact that this contention concerns itself only with Evola's complicity at the second meeting in "Mexico's" hotel room where the importation of narcotics was discussed, nothing in the record warrants the contention that Cantellops substituted Evola for Galente. Cantellops did not confuse Evola with Galente before the grand jury or at trial, and petitioner's comparisons of Cantellops' trial and grand jury testimony, above, are improper.[19] By his participation

[19] Evola's trial counsel in his summation, read the grand jury testimony of Cantellops describing Galente, and then requested Evola to stand so that the jury could see the obvious difference between the two men (Tr. 6364–6362).

in two meetings where either the importation or territorial distribution of narcotics was discussed, and by his assisting Ormento in instructing Cantellops regarding a delivery of narcotics in Brooklyn in August, 1956, the evidence sufficiently indicated that Evola not only knew the scope of the conspiracy and voluntarily associated himself with it, but that he knowingly participated with his co-conspirators in promoting its objects.[20]

[20] There was no flat contradiction between the dates Cantellops gave for a narcotics meeting attended by Cantellops, Evola and others, and the date given by Cantellops for his Puerto Rican narcotics trip, as Evola contends (Pet. No. 735, 10–11), for Cantellops only approximated the dates of these two events as the "[e]nd of August or beginning of September, 1956" (Tr. 1291, 1321; 2637), and testified that he was in Puerto Rico during the early part of September, 1956 (Tr. 1321, 3437). Nor was there necessarily a contradiction between Cantellops' trial and grand jury testimony as to whether Santora or Evola suggested that the narcotics be imported through Miami (see G.J. 170, 240, and Tr. 1229A), for Cantellops testified that all participated in the conversations (Tr. 1229). And petitioner's contention that "there was no Mexican living at this hotel [the Del Rio Hotel] during the summer of 1956 and that it was then not a transient hotel" is not supported by the testimony of Mr. Okun on whose testimony petitioner predicates the contention. Mr. Okun, on cross examination by the Government, admitted that he judged the nationality of occupants whom he did not see by the name signed in the register (Tr. 5883–5884); that he did not see each registrant, let alone visitors, who were not even recorded (Tr. 5885–5886); that he was unable to be at the Del Rio Hotel all the time due to his four other hotels, one of which was in Hartford, Connecticut (Tr. 5865); that during early August when the meetings transpired in "Mexico's" hotel room, the hotel records, on which he relied, were kept by him and others (Tr. 5868–5870, 5875–5876). When confronted by his own hotel records, which indicated transient guests at a subsequent time, he testified that there were transients that he did not know about. (Tr. 5880–5885). Moreover, the meet-

6. Gigante's knowledge of the chief conspirators, in conjunction with the fact that he drove Cantellops to Lorain, Ohio, knowing that narcotics were hidden in the trunk and that Cantellops was to take the narcotics to Cleveland, and that he drove Genovese, Ormento and Cantellops to Mazzie's house, knowing that the meeting would concern itself with the territorial control of narcotics, sufficiently indicated that Gigante knew the scope of the conspiracy and that his transportation of Cantellops with the narcotics furthered its objects.

7. After omitting several salient facts in the record,[21] petitioner Capece contends that the evidence is insufficient to support her conviction, and that the court committed prejudicial error in allowing testimony concerning the large sum of money found on her person, following her return to New York from Havana, Cuba (Pet. No. 807, 20–26). The record,

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ings with "Mexico", in conjunction with Ormento's request that Cantellops entertain "Mexico" for a few days (three days) (Tr. 1230–1231) indicated that "Mexico" was at the Del Rio Hotel for six days and quite probably more, thus qualifying as a weekly guest at the hotel (Tr. 5853).

[21] For example, petitioner argues (Pet. No. 807, 23–24) that the evidence did not disclose that petitioner "knew the contents of the package" which she passed to Basile. The record, however, indicates not only that Joseph Di Palermo and Basile discussed narcotics prior to the delivery, but that Joseph Di Palermo was angered at the risk of being exposed to one of Basile's customers who was nearby (Tr. 3946–3948). Again, petitioner's restatement of the Havana trip, and her argument predicated thereon, omits the salient fact that the Havana trip followed a meeting during which Di Palermo was advised that he should not expect any more narcotics from Cuba for the rest of the year (Tr. 1338–1340).

however, indicates that the petitioner actively assisted Joseph Di Palermo in the distribution of large quantities of narcotics to Joseph Basile; relayed messages from Basile to Joseph Di Palermo; arranged meetings between the two men, and received money from narcotics transactions.

The evidence concerning petitioner's Havana trip, her "traveling companions" and the discovery of a large sum of money on her person following the return to New York, when coupled with the fact that two months prior to the Havana trip Joseph Di Palermo had been advised not to expect any more narcotics from Cuba for the rest of the year, was a circumstance relevant to petitioner's complicity in the conspiracy. See *Heike* v. *United State*, 227 U.S. 131, 145; *Clune* v. *United States*, 159 U.S. 590, 592, 593; *Phelps* v. *United States*, 160 F. 2d 858 (C.A. 8), certiorari denied *sub nom. Peters* v. *United States*, 334 U.S. 860.

8. Genovese's participation at a meeting with several top conspirators where the territorial control and distribution of narcotics was planned, his associations with other top narcotics conspirators, when coupled with the fact that policy decisions were to be referred to "The Right Man", a name by which the petitioner was known, amply supports the finding of the court below that "he had a real interest and concern in the success of the conspiracy." 274 F. 2d 179, 188. See the Statement, *supra*.

II

The various objections to the trial court's rulings during the course of the trial are without merit.

a. The contention of petitioner Evola that his right of cross-examination was injuriously affected when

the court relaxed the rule of sequestration to allow Cantellops to speak to his daughter (Pet. No. 735, 13–16) is, as the court below ruled, without merit. The rule of sequestration is designed to prevent prospective witnesses from matching their testimony with that elicited from other witnesses, and its application is vested in the sound judicial discretion of the trial court. *Mitchell* v. *United States,* 126 F. 2d 550, 553 (C.A. 10), certiorari denied, 316 U.S. 702; *Kaufman* v. *United States,* 163 F. 2d 404, 408 (C.A. 6), certiorari denied, 333 U.S. 857. Petitioner's contention that he lost the "potency" of his cross-examination because of "[a] day's suspension of cross-examination" is without foundation in fact. Following the noon recess on February 11, the jury was excused and the afternoon session was taken up with legal argument on two government motions without objection by counsel for defendants. On the following day, Cantellops was cross-examined fully on the same subject matter on which he was cross-examined up to the noon recess of February 11.

No error was committed when the trial court appointed counsel to advise Cantellops regarding his constitutional rights. The court may properly take whatever steps are necessary to protect the constitutional rights of witnesses under such circumstances (see *Hamer* v. *United States,* 259 F. 2d 274, 282 (C.A. 9), certiorari denied, 359 U.S. 916; *Gruher* v. *United States,* 255 Fed. 474, 477 (C.A. 2)). No possible prejudice to the petitioner resulted since counsel advised Cantellops to answer all questions put to him regard-

ing the subject matter raised on cross-examination. (See the Statement, *supra*, p. 18.) As the court below noted, the trial court was "exceedingly generous in the latitude it gave counsel in cross-examining Cantellops, even to the point of permitting considerable repetition and minute inquiry into many matters of doubtful relevance." 274 F. 2d at 192–193.

b. Pointing to the fact that the trial court refused to order Cantellops (who was then in federal custody pursuant to a writ of habeas corpus ad testificandum) to attend a pretrial meeting with counsel for Rodriquez, wherein counsel proposed to ask Cantellops whether he would consent to an interview, petitioners Capece and Joseph Di Palermo[22] contend that they were prejudiced in preparing for trial (Pet. No. 807, 5, 7, 18–20; Pet. No. 812, 17).[23] The short answer is that the trial court permitted counsel to address a communication to Cantellops requesting an interview (Vol. I, Minutes of hearing, December 9, 1958, pp. 339–343). See *Dicks* v. *United States*, 253 F. 2d 713 (C.A. 5). Counsel for Rodriquez indicated that he would not avail himself of this oppertunity, and nothing in the record indicates that petitioners addressed such a communication to Cantellops. The court acted within its proper area of discretion in allowing defense counsel a different mode of access to Cantellops. Petitioners, who apparently did not try to communi-

[22] The trial court ruled that motions made on behalf of one defendant would be deemed to have been made by all defendants unless there was a specific disassociation with the motion.

[23] Petitioner Geniovese raises this issue, but does not argue it (Pet. No. 817, 41).

cate with Cantellops, have no basis for complaint. The issue was not even raised in the court below, except by Rodriquez.

c. The contention of petitioner Genovese (Pet. No. 817, 42–43) that the trial court erred in failing to require an inquiry "under oath and subject to cross-examination" into "Begendorf's purposes and information" in visiting Genovese on December 6, 1958, is frivolous. Petitioner's motions to take the depositions of Begendorf and Enright, as set forth in the Statement, *supra*, pp. 24–25, were properly denied, for not only were Begendorf and Enright available for call as witnesses, but the subject matter concerning which their examinations were sought consisted of the collateral issues of whether Begendorf had ever been assigned to Enright's squad and what Begendorf's "purposes and information" were in visiting Genovese, matters clearly outside the scope of Rule 15, F.R. Crim. P. Cf. *United States* v. *Broker*, 246 F. 2d 328 (C.A. 2), certiorari denied, 355 U.S. 837. Petitioner's assertion (Pet. No. 817, 42–43) that the trial judge was "hostile" to the inquiry is without foundation in fact. The court patiently listened to the many arguments of counsel (See Vol. I, 271–507a; Tr. 3993–4003), including the suggestion that it disqualify itself (Tr. 4001–4002), invited counsel to submit briefs (Vol. I, 431, 450), and reserved decision until it could study the authorities (Vol. I, 450–452). It earned the comment of the court below that "[t]he trial judge ex-

hibited commendable patience and courtesy in the face of such maneuvers." 274 F. 2d at 195.[24]

d. Petitioner Genovese argues (Pet. No. 817, 39–41) that there is nothing in the opinion of the court of appeals to indicate that consideration was given to the rulings of the trial judge, as set forth in the Statement, *supra*, regarding production of reports of statements by Cantellops.[25] Since neither the petitioner nor his codefendants raised this issue in the court below, petitioner's argument falls with his predicate. Actually, petitioner was given all that was due him under 18 U.S.C. 3500 when the trial judge, following a lengthy *in camera* inquiry into the reports and *voir dire* examination of the narcotics agents, ordered the production of all portions of the agents' reports which were substantially verbatim accounts of what Cantellops had told them. See the Statement, *supra*, pp. 19–20. And the fact that the petitioner had "no way of knowing the contents of those reports" is of no import,

[24] Petitioner's reliance on *Nardone* v. *United States*, 308 U.S. 338, is misplaced. In *Nardone*, this Court reversed the conviction of the petitioner because the trial judge refused to allow him to inquire into the uses which the government had made of illegally obtained evidence secured through wiretapping. *Id.* at 339, 341–342. In the instant case, however, there is not only no question of illegally obtained evidence, but the data sought from Begendorf and Enright could have been obtained by the petitioner through the simple expedient of calling them as witnesses.

[25] Petitioner misstates the record when he asserts (Pet. No. 817, 27–28) that the trial judge "refused to make available to the defense" six of Consoli's reports, Enright's April 14, 1958, report and Muglia's two reports. The record indicates that the trial judge ordered the production of the substantially verbatim statements of Cantellops found in each of the six Consoli reports (Tr. 2033, 2035, 2037), and those substantially verbatim accounts of Cantellops found in Enright's April 14th report (Tr. 2042) and Muglia's report of April 25, 1958 (Tr. 2043).

for as this Court noted in *Palermo* v. *United States*, 360 U.S. 343, 354, "It would indeed defeat" the purposes of 18 U.S.C. 3500 "to hold that the defense may see statements in order to argue whether it should be allowed to see them."

e. A New York policeman testified to admissions by Ralph Polizzano (No. 792 Misc.) at the time of his arrest. After Marino had testified that police had struck the petitioner, the petitioner moved for a hearing on the voluntariness of his admissions (Tr. 409–411, 432–434), a request which was granted. Petitioner contends that questions asked at that hearing rendered it unfair (Pet. No. 792 Misc., 11–12).

The questions were proper. The court properly questioned the petitioner regarding his past arrests, for "one without experience, possessed of little knowledge, may be more readily intimidated and more quickly influenced by threats or offers of reward than those possessing more experience and greater fortitude." *Murphy* v. *United States*, 285 Fed. 801, 808 (C.A. 7). Cf. *Thomas* v. *Arizona*, 356 U.S. 390, 401. And the inquiries by the United States Attorney into petitioner's plea of guilty to a New York charge of "attempted felonious possession of narcotics" was relevant to the issue of voluntariness, since the New York charge was predicated on the circumstances surrounding petitioner's arrest, including his admissions in question (Minutes of hearing, January 28, 1959, pp. 52–56 (following Tr. 1432a)).

At the conclusion of the first phase of the hearing, the court found petitioner's testimony to be "entirely incredible" and contradictory to the testimony of

Marino on whom he relied. Nevertheless the court permitted the government witnesses to testify "just [to] complet[e] the record" (Minutes of hearing, January 28, 1959, pp. 83–84). In its instructions to the jury, after stating the disputed facts, the court charged (Tr. 7155–7156):

> Ladies and Gentlemen, if you find that the statements which Detective Gibbons testified were made to him by Ralph Polizzano were in fact made, but that they were not made voluntarily but only out of fear of physical harm, I then instruct you to disregard such statements entirely and not to allow them to play any part in your deliberations. In any event you may not consider such statements in connection with the guilt or innocence of any of the other defendants since those statements were introduced and admitted solely as against Ralph Polizzano.

Petitioner was entitled to no more. *Wilson* v. *United States*, 162 U.S. 613, 614; *Smith* v. *United States*, 268 F. 2d 416, 420–421 (C.A. 9); *Wright* v. *United States*, 250 F. 2d 4, 13 (C.A. D.C.).[26]

f. Also without merit are the contentions that the courtroom outburst of the defendant Fiano (Tr. 5091–5096), after eleven weeks of trial, prejudiced

[26] Ralph Polizzano (Pet. No. 792 Misc. 22–23) argues that, in view of his conviction in New York for the acts as to which Detective Gibbons testified to at the instant trial, his conviction violated the policy announced by the Attorney General that the federal government would not normally prosecute for the same transaction for which a state prosecution had been brought. That policy has no application here, for the events at the time of this petitioner's arrest in July 1957 were only a small part of his extensive involvement in the conspiracy from 1955 to 1957.

petitioners.[27] During testimony as to Fiano he blurted out a statement that "[t]hey are all convicts right here." The following ensued (Tr. 5092–5093):

> THE COURT. Ladies and gentlemen of the jury: Some statements were made by the defendant Louis Fiano. He was not on the stand. His statements are not proof. They were entirely unsolicited. You are to totally disregard them.
>
> DEFENDANT FIANO. You don't need a United States Attorney; you do a good job. Bring the man in here and then bring out here I am incarcerated or anything else. This is worse than Germany, for God's sake. This is worse than Germany. They forgot the Constitution.
>
> THE COURT. The United States Marshal is expected to do his duty and use as much force as necessary in order to accomplish his duty.
>
> Ladies and gentlemen, you heard the last comments and you are to pay as much attention to the other comments that were made as to the last comments. The Court, unfortunately, cannot give you his views at this time with respect to the defendant, but all the statements that he made to you are to be completely disregarded. There is no proof of anything that he said, and the only thing you take into your mind when you consider, when you come to deliberate, is what you hear from the witness stand, not irresponsible utterances from anybody, and the Court, of course, strikes them all out.

[27] Pet. No. 793 Misc., 12–13; Pet. No. 792 Misc., 13–14; Pet. No. 750 Misc., 22–23. Petitioner Genovese joins in this issue, but does not argue it (Pet. No. 817, 41).

In moving for a mistrial, one defense counsel said his client had no record. The court, after repeating its admonition to follow instructions, said (Tr. 5096):

> Now, the statement made by one of the counsel was entirely irregular. That is all the Court can say at this time. But you are not to assume that because one counsel rises to say that his client does not have a criminal record, first, you are not to assume from that that that is the truth, nor are you to assume from that that any other one single defendant has any conviction against him.
>
> And, I am sure, ladies and gentlemen, that you will obey this instruction and that it won't be necessary to declare a mistrial after this 11 weeks because of the misconduct of a defendant and then the misconduct of a lawyer.

That the jury subsequently acquitted Fiano (as to whom the testimony showed only the delivery of a package of narcotics on Cantellops' first trip, several long-distance telephone conversations with a few of the conspirators, and the possession of two nonpublished telephone numbers of two conspirators) indicates how well the jury followed the instructions to disregard the incident. *Reistroffer* v. *United States*, 258 F. 2d 379, 392–393 (C.A. 8), certiorari denied, 358 U.S. 927; *Aeby* v. *United States*, 206 F. 2d 296, 300 (C.A. 5), certiorari denied, 346 U.S. 885.

g. Petitioners Ralph and Carmine Polizzano (No. 792 Misc. and No. 793 Misc.) complain of the introduction into evidence of a post-conspiracy confession of co-defendant Aviles which referred to a "Ralph" whom Aviles allegedly met in the "Squeez-Inn Bar" (Tr. 5485–5492). Ralph Polizzano contends that the

confession corroborated the testimony of Cantellops and Marino because it related that "Ralph" wanted Aviles to buy narcotics directly from him instead of the "Spanish fellow", that Aviles purchased narcotics from "Ralph," and that "Junior" delivered narcotics to Aviles (Pet. No. 792 Misc., 9–11). Petitioner Carmine Polizzano's complaint,[28] which he is raising for the first time in this Court, is that the confession related that Aviles met "Ralph" in the "Squeez-Inn Bar," an establishment which petitioner had earlier stipulated that he owned and operated during the period in question (Pet. No. 793 Misc., 15–16; see Tr. 5425). The trial court, however, not only emphasized the requirement throughout the trial and in its jury instructions that the jury had to deliberate on the guilt of each defendant on a separate and individual basis (Tr. 64–65, 689, 5093, 5294, 6124, 7077–7080, 7094–7097, 7099, 7102, 7105–7106, 7110, 7119, 7122, 7126, 7129, 7131, 7134, 7140, 7150, 7156, 7157, 7159, 7180), but admonisned the jury on five occasions that they could consider the confession only against Aviles and no one else (Tr. 5474–5475, 5484–5485, 5492–5493, 7098, 7223–7224). These admonitions were re-emphasized when, prior to transmitting the confession to the jury as requested, the court ordered the word "Ralph" deleted from the confession and instructed the jury that "a name * * * is going to be deleted" because the confession, if made at all, "is not to be considered against anybody other than himself" (Aviles) (Tr. 7223–7224). The jury must be

[28] Carmine Polizzano, clearly, has no standing to complain that the trial court erred in denying Aviles' request that he be accorded a hearing into the voluntariness of the confession.

presumed to have followed these instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

III

Cantellops pleaded guilty in the General Sessions Court of New York County to the charge of attempted felonious possession of a narcotic drug. On November 26, 1957, he was sentenced to serve a term of imprisonment of from three years and nine months to four years and six months. He was named as a co-conspirator, but not a defendant, in the instant indictment (App. 50–51a).

Cantellops testified that no promises or threats were made to him by the government for his testimony (Tr. 1965–1972, 2217, 2597–2598, 3260). In their arguments to the jury, several of the defense counsel stated that the government had coached Cantellops, that his entire story was a "fairy tale," and that the government made promises to Cantellops for his testimony (Tr. 6321–6322, 6503, 6686, 6716; see Tr. 6230, 6286). In his closing argument to the jury, the United States Attorney said (Tr. 6756–6758):

> Counsel have also suggested to you that Cantellops had a motive to lie. But let us see what motive Cantellops could have had. He was picked up in July of 1957 and he talked to the agents and to Shaw after his arrest. He appeared before the grand jury at the end of July, 1957, and in August he pleaded guilty; and that was plea that covered two indictments.
>
> Now, what kind of consideration did he get? His sentence was three years and nine months to four years and six months and he was sentenced on November 26, 1957. So it is apparent

that Cantellops is still in jail and has some time to go.

* * * * *

Cantellops made only one appearance before the grand jury before he appeared in March of 1958, and at that time, in March of 1958, Cantellops had already been sentenced. He had gotten his time.

Now, if as counsel suggest, he got a minimum sentence, what point would he have, what motive would he have to come in here and make up a story? It would be much easier for him to do his time and not expose himself to this. The earliest he could have gotten out would be three years nine months, less time for good behavior. Nobody could get him off of that. So the consideration that he got, if you would believe counsel, it seems to me, would hardly be that which would make a man invent a story. He had gotten his time. He would be better off to keep quiet.

On July 1, 1959, the Governor of New York commuted Cantellops' minimum sentence of three years and nine months to two years and eight days, leaving the maximum term of imprisonment at four years and six months. On July 16, 1959, the New York State Parole Board placed Cantellops on parole. His parole will terminate on January 8, 1962. Prior to the Governor's action, the present United States Attorney, Mr. Gillespie, had called the attention of the Governor to the cooperation of Cantellops and had requested that consideration be given to the possibility of an earlier parole date.

Two petitioners (Pet. No. 750 Misc., 11–14, 19–22; Pet. No. 817, 43–45) argue that this shows that Can-

tellops was lying and that the argument of counsel was improper. The mere fact that some clemency was accorded Cantellops after the trial does not show that promises were made to Cantellops before trial. The fact that Cantellops did not begin to cooperate with the federal grand jury until March 1958, after his sentencing in the state court, supports this claim.[29] Unlike *Napue* v. *Illinois*, 360 U.S. 264, where the prosecutor did nothing to correct the false testimony of a witness whom he had promised consideration, the evidence here is uncontradicted that no promises were made to Cantellops, and there is no basis for the assertion that the United States Attorney knew the testimony was untruthful.

The closing argument of the United States Attorney, when read in context, does not carry the implications petitioners place on it. It was proper to point out that Cantellops had already been sentenced for the state crime in November 1957, before he began to cooperate with federal authorities in March 1958, and that it would have been easier for him to serve the sentence than run the risks that came from disclosure. Petitioners seize on one statement in the whole long argument—that no one could get Cantel-

[29] The statement in Pet. No. 750 Misc. that Cantellops began to cooperate with the federal authorities in July 1957, before he was sentenced in the state court, is refuted not only by Cantellops' testimony at the trial that he was "uncooperative" at that time, but by the grand jury minutes themselves which disclose the evasive, perjurious responses of Cantellops to questions put to him before the grand jury in July 1957. The New York judge who sentenced Cantellops on November 26, 1957, did allude, however, to some general form of cooperation between Cantellops and the federal authorities at that time. This was brought out at the trial (Tr. 2288–2289).

lops off of that sentence—but when read in relation to the preceding and following sentences, it is evident that this referred to the position of Cantellops when he decided to cooperate—*i.e.*, the position of a man already under sentence.

IV

Three petitioners (Pet. No. 792 Misc., 14–15; Pet. No. 793 Misc., 13–14; Pet. No. 817, 30–34) contend that they could not receive a fair trial because of adverse publicity. The pre-trial publicity complained of occurred mostly at the time of arrest and arraignment in the summer of 1958, about five months before trial. None of the jurors had read any of the questioned newspaper publicity. During the trial, the court admonished the jury (or reminded the jury of its admonition) on eighty separate occasions to refrain from reading any publicity regarding the case, or from listening to any radio or television broadcasts regarding the case, or from discussing the case with anyone, or from remaining in the presence of anyone who was discussing the case.[30] On February 16 and 17, 1959, in response to questioning, the jurors indicated that they did not read any articles concerning the case (Tr. 2705, 2861). Two days before the case

[30] Tr. 68, 141, 238, 415, 529, 591, 661–663, 688–689, 770–770a, 846–847, 863–864, 882, 1004–1005, 1011, 1106–1107, 1109–1110, 1192–1193, 1263–1264, 1347, 1394–1395, 1527, 1612–1613, 1803–1804, 2009–2010, 2153, 2263, 2271–2273, 2343, 2428, 2545, 2626, 2677–2678, 2848, 2934, 2983, 3056–3057, 3158, 3264–3265, 3369–3369a, 3493–3493a, 3536–3538, 3624, 3690–3691, 3884, 3986, 4102–4104, 4284–4285, 4366, 4463, 4530–4531, 4602, 4694, 4743–4744, 4792–4793, 4878–4879, 5210a, 5272–5273, 5353–5354, 5415–5416, 5497, 5511, 5707–5708, 5729, 5814, 6031, 6080, 6125–6126, 6239, 6293–6294, 6344, 6398–6399, 6449–6449a, 6523–6524, 6592–6592a, 6669, 6741–6743, 6795, 6881–6882, 7057–7060, 7218.

was submitted to the jury, petitioners refused the court's offer to inquire of the jury again (Tr. 6681). Unlike *Marshall* v. *United States*, 360 U.S. 310, where this Court reversed the conviction of the petitioner because a substantial number of the jurors had read prejudicial newspaper accounts concerning the petitioner and his wife, the instant case presents no such problem, for the jurors never read any of the prejudicial publicity.[31]

V

The Lessas contend (Pet. No. 772, 11–17) that convictions in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, precluded their trial in the instant case on the ground of double jeopardy. As discussed above, the *Stromberg* record shows that it involved a different conspiracy relating to narcotics imported from France.

Petitioners were connected with the *Stromberg* conspiracy through their wholesale purchases of narcotics from Vellucci, who was not mentioned in the instant conspiracy (*Stromberg*, App. 478–483). On November 5, 1955, petitioners lost their source of narcotics when Vellucci was arrested (*Stromberg*, App. 583–586). They then turned to Ormento for their supply of narcotics, and through August 1956 had narcotic transactions with Ormento, Mazzie and Contes, with Cantellops delivering narcotics to the petitioners for Ormento (see the Statement, *supra*). Since the petitioners joined and

[31] The situation here is totally unlike that in *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1), on which petitioner Genovese relies, where a Congressional subcommittee held hearings in the city of trial following the return of the indictment with respect to the precise issues upon which the defendant was tried.

actively fostered the ends of the instant conspiracy, as distinguished from their participation in the *Stromberg* conspiracy, they could be punished for their participation in this separate criminal enterprise.

VI

Petitioner Barcellona contends (Pet. No. 840 Misc., 12–14) that his conviction should be reversed because he did not have the assistance of counsel at every stage of the proceedings against him. While it is true that petitioner did not have counsel from July 17, 1958, until November 25, 1958, when the court appointed Roy L. Reardon to represent him, that fact in no way prejudiced petitioner. The court ruled that petitioner would receive the benefit of all pretrial motions made on behalf of his co-defendants. Counsel had six weeks within which to prepare petitioner's defense. He neither moved for a continuance nor complained that he had insufficient time in which to prepare for trial. Petitioner does not suggest that anything which properly could have been done was not done. Petitioner's constitutional right to counsel was satisfied, for he had the "effective aid of counsel in the preparation and trial of the case." *Edwards* v. *United States,* 139 F. 2d 365, 367 (C.A.D.C.), certiorari denied, 321 U.S. 769; *Maye* v. *Pescor,* 162 F. 2d 641, 643–644 (C.A. 8); *United States* v. *Bergamo,* 154 F. 2d 31, 34–35 (C.A. 3); *Gadsden* v. *United States,* 223 F. 2d 627, 631 (C.A.D.C.); *United States* v. *Wright,* 176 F. 2d 376, 379 (C.A. 2). Cf. *Avery* v. *Alabama,* 308 U.S. 444, 446; *Powell* v. *Alabama,* 287 U.S. 45, 71.

VII

Petitioner Genovese offers to this Court for evaluation a number of items of allegedly newly-discovered evidence (Pet. No. 817, App. D) which he claims so impeach the credibility of Cantellops as to call for a reversal of his conviction. The proper place to present this evidence is in the district court by a motion for a new trial under Rule 33, F.R. Crim. P. Petitioner has chosen not to follow that procedure, but to present the items first to the Solicitor General in a special communication and then to this Court in the petition for certiorari. Since the materials presented call in question the integrity of a narcotics agent and an Assistant United States Attorney (App. D–3), and counsel has called upon the Solicitor General to consider them in deciding upon the government's position in this Court, the Solicitor General deems it appropriate to state that upon inquiry he is personally satisfied both that the challenge to the integrity of the government agents is unjustified and that the new materials do not warrant his consent to a motion for a new trial. The partial recantation relied upon has been repudiated by Cantellops as the product of duress and bribery, and the circumstances surrounding its procurement have been the subject of a grand jury inquiry in the Southern District of New York. When the matter is properly presented for judicial decision before the appropriate tribunal, the district court, the circumstances which have led to the conclusion that a new trial is not warranted will be fully presented. Cf. *Harrison* v. *United States*, 191 F. 2d 874, 886 (C.A. 5).

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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